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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

Allstate Indemnity Company, and Allstate  
Vehicle and Property Ins. Co.,

Plaintiff,

v.

Jody Draper, Brad Dumilieu, West Gate  
Group LLC, an Oregon Limited Liability  
Company, OMT Associates, LLC, dba Keller  
Williams Realty, Inc., an Oregon Limited  
Liability Company, Travis Tubbs, Denay  
Tubbs,

Defendants.

Case No. 3:18-CV-00759

COMPLAINT FOR DECLARATORY  
RELIEF

The Plaintiff, Allstate Indemnity Company and Allstate Vehicle and Property Ins. Co. (“Allstate”), by and through its attorneys, Douglas F. Foley of Douglas Foley & Associates, PLLC, hereby alleges as follows:

1. This action for Declaratory Relief is one in which the United States District Court is given original jurisdiction by reason of diversity of citizenship and the requisite amount in controversy exceeds \$75,000 pursuant to Title 28, U.S.C. §1332.

2. Allstate Indemnity Company and Allstate Vehicle and Property Insurance Co. ("Allstate") are Illinois corporations authorized to transact the business of insurance in the State of Oregon, whose principle place of business is in the State of Illinois. Allstate Indemnity Company and Allstate Vehicle and Property Insurance Co. are deemed to be citizens of the State of Illinois.

3. Upon information and belief, at all times pertinent to this lawsuit, Defendant Judy Draper is a resident of Linn County and is a citizen of the State of Oregon.

4. Upon information and belief, Defendants Travis Tubbs and Denay Tubbs reside in Marion County and are citizens of the State of Oregon.

5. Upon information and belief, Defendant Brad Dumilieu resides in Marion County and is a citizen of the State of Oregon.

6. Upon information and belief, Defendants West Group LLC and OMT Associates, LLC are Oregon Limited Liability Companies and are deemed citizens of the State of Oregon.

7. Allstate issued a Homeowners Policy, Landlords Package Policy, and Personal Umbrella Policy to Judy Draper, providing certain coverages subject to the terms, definitions, exclusions, limitations, and conditions contained in the insurance contract.

### **I. THE UNDERLYING COMPLAINT**

8. This coverage case involves the sale of residence where it is alleged that the seller did not disclose damage caused by drug activity on the premises. Defendants Travis Tubbs and Denay Tubbs filed a lawsuit in the Circuit Court for Marion County, Case No. 18CV03446. The underlying lawsuit is attached as Exhibit 1. All allegations of the Marion County Complaint are incorporated by reference. The following statement of facts is extracted from the Complaint filed by the Plaintiffs in the underlying case. Allstate does not necessarily agree to the veracity of the facts alleged but recites the following facts for the

sole purpose of identifying the issues in dispute in this matter with respect to the coverages provided by Allstate, subject to the terms, definitions, exclusions and conditions of the insurance contract issued by Allstate. The underlying Complaint is referenced in the following paragraphs set forth below.

### **FIRST CLAIM FOR RELIEF**

#### **Breach of Contract**

The General Allegations are hereby incorporated. (Complaint ¶12) In April 2017, the Tubbs and Sellers entered into the Agreement. The Agreement required the Tubbs to pay \$375,000.00 for the Property and required Sellers to convey title and to make certain disclosures relating to the Property. (Complaint ¶13) The Tubbs complied with all requirements and conditions of the Agreement. (Complaint ¶14) The Sellers breached the Agreement through the following acts and omissions: 1) by failing to disclose that the Property contained toxic and hazardous substances; 2) by failing to disclose that the Property had been and was used as a site for the manufacturing, use, or distribution of methamphetamine; 3) by failing to disclose that the electrical utility lines had been cut or illegally tampered with in order to steal electrical service; and 4) by failing to vacate the Property after closing. (Complaint ¶15) As a result of Sellers' breach, the Tubbs have or will incur the following, damages, costs and expenses: Hotel expenses because the dwelling is not habitable; (Complaint ¶16.1) Purchase of a mobile trailer where the Tubbs and their children currently reside; (Complaint ¶16.2) The cost to repair and restore the electrical wiring; (Complaint ¶16.3) The cost to repair and secure permits for the septic system; (Complaint ¶16.4) The cost for methamphetamine abatement and remediation; (Complaint ¶16.5) Fees for the storage of the Tubbs' personal property; (Complaint ¶16.6) The cost to restore Tubbs' credit score; and (Complaint ¶16.7) Interest and fees related to loans secured by the Tubbs as a result of Sellers' acts and omissions. (Complaint ¶16.8) The costs, expenses and damages

suffered by the Tubbs is at least \$635,513.00, not including emotional distress and pain and suffering. Under the Section 38.2 of the Agreement, the Tubbs are entitled to their attorney fees and costs. (Complaint ¶16)

### **SECOND CLAIM FOR RELIEF**

#### **Fraud - (Defendant Dumilieu Only)**

The General Allegations are hereby incorporated. (Complaint ¶17) The Sellers were required to disclose and represent the true condition of the Property. Instead, the Sellers withheld the true condition of the Property until after the date of closing. (Complaint ¶18) Defendant Dumilieu intentionally and willfully withheld the true condition of the Property and failed to make the required Disclosures and convey the Defects to the Tubbs. (Complaint ¶19) Defendant Dumilieu knowingly mislead the Tubbs in an effort to induce the Tubbs to purchase the Property. (Complaint ¶20) The Tubbs detrimentally relied on the statements and omissions of Dumilieu, and purchased the Property without the full knowledge of the condition, Disclosures, and Defects. (Complaint ¶21) As a result of Defendant Dumilieu's acts and omissions, the Tubbs have been damaged in the amount described in Paragraph 16, above. (Complaint ¶22)

### **THIRD CLAIM FOR RELIEF**

#### **Trespass**

The General Allegations are hereby incorporated. (Complaint ¶23) Pursuant to the Agreement, closing on the Property occurred July 7, 2017. Under the terms of the Agreement, possession of the Property was to be delivered to the Tubbs on the closing date. (Complaint ¶24) After the closing date, the Sellers knowingly remained in possession of the Property, even though Sellers had no legal or equitable right to remain in possession of the Property. (Complaint ¶25) In addition, the Property became contaminated 1) during the period in which Sellers owned, controlled, and supervised the Property and; 2) as a result of

Sellers' use, manufacturing, or distribution of hazardous and toxic chemicals. Such activity is intentional, negligent, reckless or ultrahazardous and constitutes trespass. (Complaint ¶26) The Sellers' possession of the Property after closing and the Sellers' contamination of the Property caused the Tubbs to be excluded from possession. (Complaint ¶27) As a result of Sellers' trespass, the Tubbs have been damaged in amount described in Paragraph 16, above. (Complaint ¶28)

#### **FOURTH CLAIM FOR RELIEF**

##### **Violation of ORS 646.605 - 646.652**

The General Allegations are hereby incorporated. (Complaint ¶29) The Oregon Unlawful Trade Practices Act, ORS 646.605 - 646.652, required the Sellers to deliver title and possession of the Property as promised and as required under the terms and conditions of the Agreement. (Complaint ¶30) The Sellers are "Persons" as defined under ORS 646.605(4). (Complaint ¶31) The Sellers violated ORS 646.605 - 646.652 by: (Complaint ¶32) Failing to deliver title and possession as promised under the terms of the Agreement; (Complaint ¶31.1 [sic]) Failing to make the Disclosures and concealing the Defects from the Tubbs; (Complaint ¶31.2 [sic]) Employing unconscionable tactics in an effort to mislead the Tubbs; and (Complaint ¶31.3 [sic]) Making false and misleading representations about the Property. (Complaint ¶31.4 [sic]) As a result of Sellers' violation of ORS 646.605 - 646.652, the Tubbs have been damaged in the amount described in Paragraph 16, above. Under ORS 646.638 and the Agreement, the Tubbs are entitled to their attorney fees and costs. (Complaint ¶33)

#### **FIFTH CLAIM FOR RELIEF**

##### **Punitive Damages**

The General Allegations are hereby incorporated. (Complaint ¶34) Sellers' failure to make the required Disclosures and their knowledge of material facts concerning the

condition of the Property constitute reckless and outrageous conduct. Such conduct has caused serious health, life and safety concerns for the Tubbs and their children, which Sellers showed a conscious indifference toward. (Complaint ¶35) The Tubbs are entitled to punitive damages pursuant to ORS 646.638. (Complaint ¶36) As a result of Sellers' conduct and violations of ORS 646.605 - 646.652, the Tubbs are entitled to punitive damages in the amount of \$800,000.00. (Complaint ¶37)

### **SIXTH CLAIM FOR RELIEF**

#### **Negligence**

The General Allegations are hereby incorporated. (Complaint ¶38) At all material times, Sellers had an obligation and duty to disclose the true condition of the Property. (Complaint ¶39) Sellers knew, or should have known, the true condition of the Property, that the Property contained toxic and hazardous materials and that the Property had been used as a site for the manufacturing, use, or distribution of illegal drugs. Regardless, Sellers failed to make the required Disclosures and convey the existence of the Defects and thereby breached their duties and obligations to the Tubbs. (Complaint ¶40) The Sellers' failure to disclose the true condition of the Property caused a foreseeable risk of harm, and has rendered the primary dwelling unusable and created substantial health, life, and safety risks for the Tubbs and their children. (Complaint ¶41) As a result of Sellers' acts and omissions, the Tubbs have been damaged in the amount described in Paragraph 16, above. (Complaint ¶42)

### **SEVENTH CLAIM FOR RELIEF**

#### **Negligence Per Se**

The General Allegations are hereby incorporated. (Complaint ¶43) Sellers owned the Property during the time in which the dwelling became uninhabitable as a result of methamphetamine contamination. Under ORS 475.455, the Sellers are strictly liable for the costs and expenses relating to the remediation of methamphetamine chemicals and

substances. This statute is designed to protect buyers, such as the Tubbs, and the harm suffered by the Tubbs is of the type which the statute is designed to prevent. Such acts and omissions constitute negligence per se. (Complaint ¶44) ORS 105.464 required Sellers to disclose the true condition of the Property. This statute is designed to protect buyers, such as the Tubbs, and the harm suffered by the Tubbs is of the type which the statute is designed to prevent. Sellers violated the statute by failing to make the Disclosures and by failing to convey the Defects to the Tubbs. Such acts and omissions constitute negligence per se. (Complaint ¶45) As a result of Sellers' statutory violations, the Tubbs have been damaged in the amount described in Paragraph 16, above. (Complaint ¶46)

### **EIGHTH CLAIM FOR RELIEF**

#### **Nuisance and Nuisance Per Se**

The General Allegations are hereby incorporated. (Complaint ¶47) Through the Sellers' acts and omissions, the Property is contaminated with toxic and hazardous substances, thus creating an abnormally dangerous condition at the Property. The Sellers created, or allowed to be created, the nuisance intentionally, negligently, or recklessly. The toxic and hazardous substances constitute a substantial and unreasonable interference with the Tubbs' ability to use and enjoy the Property. (Complaint ¶48) ORS 105.505 authorizes the Tubbs to maintain an action for nuisance and recover damages as a result. (Complaint ¶49) Because the Property is not fit for use, Sellers have created a nuisance per se under ORS 105.555(1)(c). (Complaint ¶50) As a result of Sellers' statutory violations, acts, and omissions, the Tubbs have been damaged in the amount described in Paragraph 16, above. (Complaint ¶51)

The Plaintiffs in the Marion County Complaint plead for damages in all of their claims in the amount of \$635,513 and request equitable relief.

## **II. THE INSURANCE CONTRACTS**

8. Allstate issued a Landlord's Package Policy (Exhibit 2), a Homeowners Policy (Exhibit 3) and a Personal Umbrella Policy (Exhibit 4) to Defendant Judy Draper (hereinafter the "Insurance Contract") subject to all of the Insurance Contract's terms, conditions, definitions and exclusions. The insurance contracts and all terms are incorporated herein. The Insurance Contracts contain the following relevant language:

Allstate Indemnity Company issued a Landlord Tenant policy with respect to the subject premises which provided the following terms, definitions and coverages:

### **"Definitions Used in This Policy"**

1. **Bodily injury** – means physical harm to the body, including sickness, disability or disease, and resulting death, except that **bodily injury** does not include:

- a) any venereal disease;
- b) Herpes;
- c) Acquired Immune Deficiency Syndrome (AIDS);
- d) AIDS Related Complex (ARC);
- e) Human Immunodeficiency Virus (HIV);

or any resulting symptom, effect, condition, disease or illness related to a) through e) listed above.

**Under Coverage Y – Premises Medical Protection, bodily injury** means physical harm to the body, including sickness or disease, except that **bodily injury** does not include:

- a) any venereal disease;
- b) Herpes;
- c) Acquired Immune Deficiency Syndrome (AIDS);
- d) AIDS Related Complex (ARC);
- e) Human Immunodeficiency Virus (HIV);

or any resulting symptom, effect, condition, disease or illness related to a) through e) listed above.

\* \* \*

5. **Insured person(s)** means:

- a) if **you** are shown on the Policy Declarations as an individual and **you** are a sole proprietor, **you** and **your** resident

spouse.

- b) if you are shown on the Policy Declarations as a partnership or joint venture, the named partnership or joint venture, including any of its partners or members individually while acting within the course and scope of their duties in connection with the ownership, maintenance or use of the **residence premises**.
- c) if you are shown on the Policy Declarations as an organization other than a partnership or joint venture, the organization directors, trustees or governors of the organization while acting within the course and scope of their duties in connection with the ownership, maintenance or use of the **residence premises**.
- d) **your** employees, while acting within the course and scope of their employment in connection with the ownership, maintenance or use of the **residence premises**.
- e) any person or organization while acting as **your** real estate manager for the **residence premises**.

This policy does not apply to **bodily injury, personal injury or property damage** arising from the conduct of any partnership, joint venture or organization which is not named on the Policy Declarations as the insured.

6. **'Occurrence'** – means:

- a) under **Coverage X – Liability Protection**, an accident during the policy period, including continued and repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury, personal injury, or property damage** and arising from the ownership, maintenance or use of the **residence premises**.
- b) under **Coverage Y – Premises Medical Protection**, an accident during the policy period, including continued and repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury** and arising from the ownership, maintenance or use of the **residence premises**.

7. **Personal injury** means damages resulting from:

- a) false arrest; false imprisonment; wrongful detention;
- b) wrongful entry; invasion of rights of occupancy; wrongful eviction;
- c) libel; slander; humiliation; defamation of character; invasion of rights of privacy.

8. **Property damage – means** physical harm to or destruction of tangible property, including loss of its use resulting from such physical harm or destruction. **Property damage** does not include theft or conversion of property by an **insured person**.

\* \* \*

## **SECTION II – LIABILITY PROTECTION AND PREMISES MEDICAL PROTECTION**

### **Coverage X**

#### **Liability Protection**

##### **Losses We Cover Under Coverage X:**

Subject to the terms, conditions and limitations of this policy, we will pay compensatory damages which an **insured person** becomes legally obligated to pay because of **bodily injury, personal injury or property** damage arising from a covered occurrence. \* \* \*

\* \* \*

##### **Losses We Do Not Cover Under Coverage X:**

1. **We do not cover bodily injury, personal injury or property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, an **insured person**. This exclusion applies even if:
  - a) an **insured person** lacks the mental capacity to govern his or her conduct;
  - b) such **bodily injury, personal injury or property** damage is of a different kind or degree than intended or reasonably expected; or
  - c) such **bodily injury, personal injury or property damage** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether an **insured person** is actually charged with, or convicted of, a crime.

\* \* \*

3. **We do not cover property damage** to any: a) property owned by an **insured person**; b) property owned by others

which an **insured person** agreed to insure or for which an **insured person** agreed to be responsible; or c) property rented to, occupied or used by, or in the care of an **insured person**.

\* \* \*

8. **We** do not cover **bodily injury** or **personal injury** which results in any manner from any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, irritants, contaminants, or pollutants, including, but not limited to:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or
- d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

However, **we** do cover **bodily injury** which results from the sudden and accidental discharge, dispersal, release or escape of carbon monoxide from a heating system, an appliance for heating water, or a household appliance located at the **residence premises**.

9. **We** do not cover **property damage** consisting of or caused by any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, irritants, contaminants, or pollutants, including, but not limited to:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or
- d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

10. **We** do not cover any liability imposed upon any **insured person** by any governmental authority for **bodily injury** or **personal injury** which results in any manner from, or for **property damage** consisting of or caused by, any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, irritants, contaminants, or pollutants, including, but not limited to:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or

d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

11. We do not cover any loss, cost or expense arising out of any request, demand, or order that any **insured person** test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to or access the effects of any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, irritants, contaminants, or pollutants, including, but not limited to:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or
- d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

\* \* \*

14. We do not cover **bodily injury, personal injury or property damage** arising out of any premises, other than the **residence premises**, owned, rented or controlled by an **insured person**.

15. We do not cover **bodily injury, personal injury or property damage** arising from any contract or agreement, whether written or oral.

\* \* \*

18. We do not cover **personal injury** caused by a violation of a law or ordinance committed:

- a) by an **insured person**; or
- b) with an **insured person's** knowledge or consent.

\* \* \*

22. We do not cover **bodily injury, personal injury or property damage** which, in whole or in part, arises out of, is aggravated by or results from mold, fungus, wet rot, dry rot or bacteria.

23. We do not cover any liability imposed upon any **insured person** by any governmental authority for **bodily injury**,

**personal injury or property damage** which, in whole or in part, arises out of, is aggravated by or results from mold, fungus, wet rot, dry rot or bacteria.”

**Oregon Amendatory Endorsement  
Landlords Package Policy AS145-3**

I. In the **General** section, the following changes are made:

A. Under **Definitions Used in This Policy**, the definition of “**Insured person(s)**” has been replaced by the following:

5. “**Insured person(s)**” means:

a) if **you** are shown on the Policy Declarations as an individual and **you** are a sole proprietor, **you** and **your** resident spouse or resident partner as defined by the Oregon Family Fairness Act of 2007.

b) if **you** are shown on the Policy Declarations as a partnership or joint venture, the named partnership or joint venture, including any of its partners or members individually while acting within the course and scope of their duties in connection with the ownership, maintenance or use of the **residence premises**.

c) if **you** are shown on the Policy Declarations as an organization other than a partnership or joint venture, the organization directors, trustees or governors of the organization while acting within the course and scope of their duties in connection with the ownership, maintenance or use of the **residence premises**.

d) **your** employees, while acting within the course and scope of their employment in connection with the ownership, maintenance or use of the **residence premises**.

e) any person or organization while acting as **your** real estate manager for the **residence premises**.

\* \* \*

C. In **Section I Conditions**, item 13. **Action**

III. **Section II Liability Protection And Premises Medical Protection** is amended as follows:

A. In **Coverage X Liability Protection**, under **Losses We Do Not Cover Under Coverage X**, items 8. and 9. are replaced by the following:

8. We do not cover **bodily injury or personal injury** which results in any manner from any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, irritants, contaminants, or pollutants, including, but not limited to:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or
- d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

This exclusion does not apply to **bodily injury** which results from:

- a) heat, smoke or fumes from a **hostile fire**.
- b) the sudden and accidental discharge, dispersal, release or escape of carbon monoxide from a heating system, an appliance for heating water, or a household appliance located at the **residence premises**.

9. We do not cover **property damage** consisting of or caused by, any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, irritants, contaminants, or pollutants, including, but not limited to:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or
- d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

This exclusion does not apply to **property damage** caused by heat, smoke or fumes from a **hostile fire**."

Allstate Vehicle and Property Insurance Company issued an AVP 81 House & Home Homeowners policy which provides, in pertinent part:

**"General**

**Definitions Used In This Policy**

Throughout this policy, when the following words appear in

bold type, they are defined as follows:

1. **Bodily injury** - means physical harm to the body, including sickness or disease, and resulting death, except that **bodily injury** does not include:

- a) any venereal disease;
- b) herpes;
- c) Acquired Immune Deficiency Syndrome (AIDS);
- d) AIDS Related Complex (ARC);
- e) Human Immunodeficiency Virus (HIV);

or any resulting symptom, effect, condition, disease or illness related to a) through e) listed above.

In addition, **bodily injury** does not include any symptom, effect, condition, disease or illness resulting in any manner from:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or
- d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

2. **Building structure** - means a structure with walls and a roof.

3. **Business** - means:

- a) any full-or part-time activity of any kind engaged in for economic gain including the use of any part of any premises for such purposes. The providing of home day care services to other than an **insured person** or relative of an **insured person** for economic gain is also a business.

However, the mutual exchange of home day care services is not considered a **business**;

- b) the rental or holding for rental of property by an **insured person**. Rental of **your residence premises** is not considered a **business** when:

- 1) it is rented occasionally for residential purposes;
- 2) a portion is rented to roomers or boarders provided not more than two roomers or boarders reside on the **residence premises** at any one time; or

3) a portion is rented as a private garage.

4. **Dwelling** - means the single-family **building structure**, identified as the insured property on the Policy Declarations, where **you** reside and which is principally used as a private residence.

5. **Insured person(s)** - means **you** and, if a resident of **your** household:

- a) any relative; and
- b) any person under the age of 21 in **your** care.

Under **Family Liability Protection–Coverage X and Guest Medical Protection–Coverage Y**, “insured person” also means:

a) any person or organization legally responsible for loss caused by animals or watercraft covered by this policy which are owned by an **insured person**. We do not cover any person or organization using or having custody of animals or watercraft in any **business**, or without permission of the owner.

b) with respect to the use of any vehicle covered by this policy, any person while engaged in the employment of an **insured person**.

6. **Insured premises** - means:

- a) the **residence premises**; and
- b) under **Section II** only:

1) the part of any other premises, other structures and grounds used by **you** as a residence. This includes premises, structures and grounds **you** acquire for **your** use as a private residence while this policy is in effect;

2) any part of a premises not owned by an **insured person** but where an **insured person** is temporarily living;

3) cemetery plots or burial vaults owned by an **insured person**;

4) land owned by or rented to an **insured person** where a single-family dwelling is being built as that person's residence;

5) any premises used by an **insured person** in connection with the **residence premises**; and

6) any part of a premises occasionally rented to an **insured person** for other than **business** purposes.

7. **Occurrence** - means an accident, including continuous

or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury** or **property damage**.

8. **Property damage** - means physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction.

9. **Residence employee** - means an employee of an insured person while performing duties arising out of and in the course of employment in connection with the maintenance or use of **your residence premises**. This includes similar duties performed elsewhere for an **insured person**, not in connection with the **business** of an **insured person**.

10. **Residence premises** - means the **dwelling**, other structures and land located at the address stated on the Policy Declarations.

11. **Roof surface** - means the roof surface material type (slate, composition, wood, tile, metal, all other roof surface material types) of a **building structure** or other structure covered under **Dwelling Protection-Coverage A or Other Structures Protection-Coverage B** and all other roofing components, including, but not limited to:

- a) flashing, caps, vents, drip edges, and ice shields;
  - b) sheeting, felt and membranes;
  - c) modified bitumen, bitumen, rubber, built-up and sprayed polyurethane foam roofing;
  - d) foam inserts and elastomeric coating;
  - e) finials, eave and gable trim and snow guards;
  - f) battens, counter battens, bird stops, gravel stops;
- and
- g) coatings, adhesives, adherents and other finishing materials for roof surface materials and all other roofing components.

12. **We, us, or our** - means the company named on the Policy Declarations.

13. **Windstorm** - means wind with or without precipitation.

14. **You or your** - means the person listed under Named Insured(s) on the Policy Declarations as the insured and that person's resident spouse.

### **Insuring Agreement**

In reliance on the information **you** have given **us**, **we** agree to provide the coverages indicated on the Policy Declarations. In return, you must **pay** the premium when due and comply with the policy terms and conditions, and inform us of any change in title, use or occupancy of the **residence premises**.

Subject to the terms of this policy, the Policy Declarations shows the location of the **residence premises**, applicable coverages, limits of liability and premiums. The policy applies only to losses or **occurrences** that take place during the policy period. The Policy Period is shown on the Policy Declarations. This policy is not complete without the Policy Declarations.

This policy imposes joint obligations on the Named Insured(s) listed on the Policy Declarations and on that person's resident spouse. These persons are defined as **you or your**. This means that the responsibilities, acts and omissions of a person defined as **you or your** will be binding upon any other person defined as **you or your**.

This policy imposes joint obligations on persons defined as an **insured person**. This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person defined as an **insured person**.

\* \* \*

## **Section II - Family Liability and Guest Medical Protection**

### **Family Liability Protection - Coverage X**

#### **Losses We Cover Under Coverage X:**

Subject to the terms, conditions and limitations of this policy, **we** will pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury or property damage** arising from an **occurrence** to which this policy applies, and is covered by this part of the policy.

**We** may investigate or settle any claim or suit for covered damages against an **insured person**. If an **insured person** is sued for these damages, **we** will provide a defense with counsel of **our** choice, even if the allegations are groundless, false or fraudulent. **We** are not obligated to pay any claim or judgment

after **we** have exhausted **our** limit of liability.

**Losses We Do Not Cover Under Coverage X:**

1. **We** do not cover any **bodily injury or property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**. This exclusion applies even if:

- a) such **insured person** lacks the mental capacity to govern his or her conduct;
- b) such **bodily injury or property damage** is of a different kind or degree than intended or reasonably expected; or
- c) such **bodily injury or property damage** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether such **insured person** is actually charged with, or convicted of, a crime.

2. **We** do not cover **bodily injury** to an insured person or property damage to property owned by an **insured person** whenever any benefit of this coverage would accrue directly or indirectly to an **insured person**.

\* \* \*

12. **We** do not cover **bodily injury or property damage** arising out of the past or present **business** activities of an insured person.

**We** will not apply this exclusion to **bodily injury or property damage** arising from the occasional or part-time **business** activities of an **insured person** who is a student under 21 years of age who is self-employed and has no employees.

13. **We** do not cover **bodily injury or property damage** arising out of any premises, other than an **insured premises**, owned, rented or controlled by an **insured person**. **We** will not apply this exclusion to **bodily injury** to a **residence employee**.

14. **We** do not cover **property damage** to property rented to, occupied or used by, or in the care of, an **insured person**. **We** will not apply this exclusion if the **property damage** is caused by fire, explosion or smoke.

15. **We** do not cover any liability an **insured person** assumes arising out of any contract or agreement."

Allstate issued an AVP189-1 Oregon Amendatory Endorsement which provides, in pertinent part:

"I. In the **General** section of the policy, the following changes are made:

A. Under **Definitions Used In This Policy** the following definition has been replaced:

**You or your**—means the policyholder named in the Policy Declarations and that policyholder's resident spouse or resident partner as defined by the Oregon Family Fairness Act of 2007.

The Personal Umbrella Policy issued by Allstate Indemnity Company provides, in pertinent part:

### ***"General Provisions***

#### ***Definitions Used In This Policy***

1. **Bodily injury** means:

- a) physical harm to the body, including sickness, disease, disability or death resulting from physical harm to the body;
- b) shock, mental anguish or mental injury.

**Bodily injury** does not include:

- a) any harm resulting from:
  - i) false arrest; false imprisonment; wrongful detention;
  - ii) wrongful entry; invasion of rights of occupancy; or
  - iii) libel; slander; humiliation; defamation of character; invasion of rights of privacy.
- b) any symptom, effect, condition, disease or illness resulting in any manner from:
  - i) lead in any form;

- ii) asbestos in any form;
  - iii) radon in any form; or
  - iv) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at any residence premises owned by an **insured**
- c) i) any venereal disease;
  - ii) Herpes;
  - iii) Acquired Immune Deficiency Syndrome (AIDS);
  - iv) AIDS related complex (ARC); or
  - v) Human Immunodeficiency Virus (HIV);

or any related or resulting symptom, effect, condition, disease or illness related to c) i) through v) above.

\* \* \*

4. **Insured person** means:

- a) **you**, and any other person who is named on the Policy Declarations;
- b) any person related to **you** by blood, marriage or adoption who is a resident of **your** household; or
- c) any dependent person in **your** care, if that person is a resident of **your** household.

However, persons defined in 4 b) who are over the age of 25 are not **insured persons** for any **occurrence** arising out of the ownership, maintenance or use of any motor vehicle owned by them.

5. **Occurrence** means an accident during the policy period, including continued and repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury, personal injury or property damage**.

6. **Personal injury** means harm resulting from:

- a) false arrest; false imprisonment; wrongful detention;
- b) wrongful entry; invasion of rights of occupancy;
- c) libel; slander; humiliation; defamation of character; invasion of rights of privacy.

Fines and penalties imposed by law are not included.

7. **Property damage** means physical harm to or destruction

of tangible property, including loss of its use resulting from such physical harm or destruction.

8. **Retained limit** means the amount of damages an **insured person** must assume and pay for any **occurrence** if:
- a) no underlying insurance is required; and
  - b) no other insurance applies to the **occurrence**

\* \* \*

### **Insuring Agreement**

In reliance on the information **you** have given **us**, we agree to provide the coverages indicated on the Policy Declarations. In return, **you** must pay the premium when due and comply with all policy terms and conditions. This includes maintaining all Required Underlying Insurance.

The terms of this policy impose joint obligations on persons defined as **insured persons**. This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person defined as an **insured person**.

This policy provides only excess insurance. It does not contribute with any Required Underlying Insurance or other insurance which applies to an **occurrence**. It also is excess to any **retained limit** an **insured person** assumes.

\* \* \*

### **Required Underlying Insurance**

**You** must maintain the Required Underlying Insurance policy. **You** must maintain the Required Underlying Insurance at or above the limits as shown on the Policy Declarations “Required Underlying Limit” at all times for each liability exposure any **insured person** has. If **you** fail to maintain the Required Underlying Insurance policy applicable to the **occurrence**, there will be no coverage for any **insured person** under this policy until the damages exceed the Required Underlying Insurance limit for that exposure. If the underlying insurance applicable to the **occurrence** does not provide at least the limits required under this section of this policy, **you** will be responsible for the damages up to the Required Underlying Insurance amounts.

If **you** maintain limits equal to or greater than the Required

Underlying Insurance limits, this policy will apply as excess above the actual limits **you** maintain. If any of **your** underlying coverage limits are used up, reduced, or canceled:

1. **you** must try to replace the coverage; and

2. **you** must notify us immediately.

***Personal Liability, Residence Premises And Residence Employees***

**You** must maintain at least the Required Underlying Insurance amount listed on the Policy Declarations for each residence premises **you** own, maintain or use. This liability coverage may be provided by either:

1. a separate Comprehensive Personal Liability policy; or
2. a Homeowners Insurance or similar package policy.

If **you** have domestic employees not subject to workers compensation laws, **you** must maintain at least the Required Underlying Insurance listed on the Policy Declarations:

1. as a separate policy; or
2. as part of **your** Homeowners Insurance or similar package policy.

\* \* \*

***Losses We Cover Under Excess Liability Insurance - Bodily Injury and Property Damage -Section 1***

**Section 1**

Under Section 1 of this policy, **we** will pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury or property damage** arising out of an **occurrence** that is both a loss **we** cover under **Excess Liability Insurance Bodily Injury and Property Damage -Section 1** of this policy and a covered loss under **your** Required Underlying Insurance policy.

**We** will not pay any punitive or exemplary damages, fines and

penalties.

This section does not apply to any **occurrence** that is covered under **Excess liability Insurance Personal Injury**.

\* \* \*

***Losses We Cover Under Excess Liability Insurance – Bodily Injury and Property Damage – Section 2***

We will cover an **occurrence** arising only out of:

1. Personal activities of an **insured person**.
2. A volunteer civic service which an **insured person** performs without pay, for a not for profit corporation and which is not a function of that person's **business**. Payment or reimbursement for reasonable expenses actually incurred by the **insured person** in connection with the volunteer civic service is not considered pay.
3. The duties of **your** employees who are not subject to Workers Compensation Laws.

\* \* \*

***Exclusions- Losses We Do Not Cover Under Excess Liability Insurance – Bodily Injury and Property Damage – Section 2***

**Excess Liability Insurance –Bodily Injury and Property Damage –Section 2** will not apply:

1. To any **occurrence** covered under **Excess Liability Insurance -Bodily Injury and Property Damage -Section 1** or under **Excess Liability Insurance -Personal Injury**.

\* \* \*

13. To **bodily injury or property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**. This includes any **bodily injury or property damage** arising out of a violation of a penal law or ordinance committed by or with the consent or knowledge of an **insured person**. This exclusion applies even if:

- a) such **insured person** lacks the mental capacity to govern his or her conduct;
- b) such **bodily injury or property damage** is of a different kind or degree than that intended or reasonably expected; or
- c) such **bodily injury or property damage** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such **insured person** is actually charged with, or convicted of, a crime.

\* \* \*

18. To any **bodily injury or property damage** arising from any contract or agreement, whether written or oral.

\* \* \*

***Excess Liability Insurance – Personal Injury Coverage XP***

Under **Excess Liability Insurance –Personal Injury**, we will pay damages which an **insured person** becomes legally obligated to pay because of **personal injury**. **Personal injury** must arise from a covered **occurrence**.

We will not pay any punitive or exemplary damages, fines and penalties.

***Losses We Cover Under Excess Liability Insurance – Personal Injury***

We will cover an **occurrence** arising only out of:

1. Personal activities of an **insured person**.
2. A volunteer civic service which an **insured person** performs without pay, for a not for profit corporation and which is not a function of that person's **business**.

Payment or reimbursement for reasonable expenses actually incurred by an **insured person** in connection with the volunteer civic service is not considered pay.

\* \* \*

***Exclusions- Losses We Do Not Cover  
Under Excess Liability Insurance –  
Personal Injury***

This coverage does not apply:

\* \* \*

7. To **personal injury** arising from any contract or agreement, whether written or oral.
8. To libel, slander or defamation of character if the first injurious publication or utterance of the same or similar material was made by an **insured person** prior to the effective date of this policy.
9. To **personal injury** arising from illegal discrimination.

\* \* \*

12. To **personal injury** intended by, or which may reasonably be expected to result from the intentional acts or omissions of, any **insured person**. This exclusion applies even if:
  - a) such **insured person** lacks the mental capacity to govern his or her conduct;
  - b) such **personal injury** is of a different kind or degree than that intended or reasonably expected; or
  - c) such **personal injury** is sustained by different person than intended or reasonably expected.

13. To **personal injury** arising out of, or which may reasonably be expected to result from, the criminal acts of any **insured person**. This includes any **personal injury** arising out of a violation of a penal law or ordinance committed by or with the consent or knowledge of an **insured person**. This exclusion applies even if:
  - a) such **insured person** lacks the mental capacity to govern his or her conduct;
  - b) such **personal injury** is of a different kind or degree than that intended or reasonably expected; or
  - c) such **personal injury** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such

**insured person** is actually charged with, or convicted of, a crime.

\* \* \*\*

### **III. CLAIM FOR DECLARATORY RELIEF**

9. Allstate realleges and incorporates herein by reference the allegations in the preceding paragraphs of this Complaint.

10. A justiciable controversy exists between the parties hereto. This controversy can be resolved by this Court through entry of its Judgment declaring the rights and liabilities of the parties alleged herein under the contracts of insurance alleged above. Allstate requests appropriate declaratory relief to establish its rights under the policy.

11. Allstate provided three policies to Jody Draper.

12. For the Homeowners policy there is no coverage for the following reasons:

12.1 The claims asserted in the underling complaint do not assert an occurrence, which is defined as an accident.

12.2 The policy excludes coverage for intentional or criminal acts.

12.3 The claims alleged by Defendant Travis Tubbs and Denay Tubbs that arise out of exposure to toxic substances are excluded by the policy terms.

12.4 Misrepresentations involving the sale of real property are economic losses that do not cause and do not constitute defined "property damage."

12.5 The claims alleged in the complaint arise out of excluded "business activities".

12.6 The damages do not arise out of a defined insured premises.

12.7 Any payment for loss of benefit of the bargain and economic loss – or property damage -- would inure to insured's benefit.

12.7 The definition of “insured person” in the policy excludes coverage for the business entities. As a result, there is no coverage for the business entities or other individuals sued.

13. For the Landlord’s Protection Policy there is no coverage for the following reasons:

13.1 The claims asserted in the underling complaint do not do not assert an occurrence, which is defined as an accident.

13.2 The policy excludes coverage for intentional or criminal acts.

13.3 The claims alleged by Defendant Travis Tubbs and Denay Tubbs that arise out of exposure to toxic substances are excluded by the policy terms.

13.4 Misrepresentations involving the sale of property are economic losses that do not constitute defined bodily injury, property damage, or personal injury. Any claim for negligence or negligent misrepresentation regarding the condition of the property does not constitute defined property damage or personal injury.

13.5 The Allstate Landlords Package policy specifically excludes bodily injury, property damage or personal injury arising out of any oral or written contract or agreement.

13.6 The definition of “insured person” in the policy excludes coverage for the business entities. As a result, there is no coverage for the business entities or other individuals sued.

14. For the Personal Umbrella Policy there is no coverage for the following reasons:

14.1 The claims asserted in the underling complaint do not do not assert an occurrence, which is defined as an accident.

14.2 The policy excludes coverage for intentional or criminal acts.

14.3 The claims alleged by Defendant Travis Tubbs and Denay Tubbs that arise out of exposure to toxic substances are excluded by the policy terms.

14.4 Misrepresentations involving the sale of property are economic losses that do not constitute defined bodily injury, property damage or personal injury.

14.5 The definition of “insured person” in the policies excludes coverage for the business entities. As a result, there is no coverage for the business entities or other individuals sued.

14.6 The Personal Umbrella Policy specifically excludes bodily injury, property damage or personal injury arising out of any oral or written contract or agreement.

14.7 The activities asserted in the underlying complaint arise out of excluded “business activities” and did not occur on a defined “business property”.

14.8 There is no coverage under the Umbrella Policy. Section 1 of the Umbrella Policy does not apply where the Homeowners Policy provides no coverage for the loss claimed. Section 2 of the policy also does not apply. Under Section 2, the Umbrella policy provides no coverage for the reasons set forth above in the exclusions to said coverage. No defined **personal injury** coverage has been asserted with respect to the Excess Liability Coverage of the Umbrella policy.

15. Allstate requests that the Court enter a Judgment herein wholly in favor of Allstate declaring, adjudicating, and decreeing that Allstate is not obligated to defend or indemnify Defendant Jody Draper for the claims alleged in the Complaint filed by Travis Tubbs and Denay Tubbs, and further enter a Judgment that Travis Tubbs and Denay Tubbs are owed nothing under the insurance contracts.

WHEREFORE, Allstate prays for relief as follows:

A. For a Declaration by this Court that Allstate is not obligated to defend or indemnify Defendant Jody Draper for the claims alleged in the Complaint filed by Travis

Tubbs and Denay Tubbs, and further enter a Judgment that Travis Tubbs and Denay Tubbs are owed nothing under the insurance contracts.

B. For costs and such other and further relief as this Court deems just and equitable.

DATED this 2nd day of May, 2018.

Douglas Foley & Associates, PLLC

By /s/ DOUGLAS F. FOLEY  
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Company and Allstate Vehicle and Property  
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